MORTGAGE TAXATION IN NEBRASKA

UNTIL recently mortgages in Nebraska were assessed in the traditional way, when discovered, — as personal property. The Legislature of 1911 declared mortgages on real property within the State an interest in the land for purposes of taxation and made them assessable at the situs of the land, to the mortgagee or his assigns. The excess in value of the real estate above the mortgage is assessed to the land owner; but the mortgagor is permitted by agreement to assume the payment of taxes on the mortgage interest, in which case the assessing officer "shall not enter said mortgage for separate assessment and taxation, but both interests shall be assessed and taxed to the mortgagor." Mortgages other than those secured by Nebraska real estate continue to be treated as personal property; but it is provided "that this act shall not apply to corporations, the property of which is now exempt from taxation." As a matter of practice a very large proportion of the mortgages made since the law went into effect contain the "tax clause" making the mortgagor liable for the payment of taxes on the mortgagee's interest as well as his own.

The purpose of the act of 1911 is indicated in the title: "To provide for the taxation of mortgages of real property and to prevent double taxation on encumbered property in the state." Much was said in the discussion of the bill about "double taxation"; the argument was made for the law and more recently for its continuance that it placed the local lender on a footing of equality with the foreign lender; but the argument that carried most weight with the legislators doubtless was that the freeing of mortgages from taxation would result in lowering the interest rate on farm mortgages. No careful statistical investigation on the effect of the law has been made; but such information as there is goes to show that the proportion of domestic to foreign mortgage

loans has risen, while the expectation of a fall in the interest rate has not been realized. The statistics that have been collected indicate that there has been, in fact, a slight increase in Lancaster county, and this is probably true throughout the state. The increase can be accounted for by the general stiffening of the interest rate during the last two years. Since a large proportion of the mortgages have long been made to corporations like insurance companies and banks, and hence were not assessable separately, or were made for export to jurisdictions where their ownership could not be traced, it could hardly have been seriously expected by the promoters of the law that the interest rate would fall. That had already been fixed, before the new law was passed, on the basis of practical exemption. On the other hand, as was expected, there has been a falling off of mortgages listed for taxation. In 1911 the assessed valuation of this item amounted to $7,960,000 and in 1912 to $6,400,000. The assessed valuation is by law one-fifth of the true value, so that the falling off of 1.5 million in the assessment roll meant the exemption of 7.5 millions of "property" hitherto assessed.

In view of these facts, and another feature of the law still to be described, a determined opposition to the new system showed itself early in the session of 1913. One of the several bills introduced for the repeal of the law passed the House. But a similar one had already failed in the Senate; and the upper House refusing assent to the House bill, the law of 1911 was left unchanged. It is not likely, however, that the Senate would have voted to retain the law if a case growing out of the statute and then pending in the Supreme Court had been decided. This case brings out some curious and unexpected features of mortgage taxation; and to its consideration we now turn.

While the assessment was in progress the question was raised as to whether Nebraska mortgages held by banks were assessable to the banks. It was promptly ruled by the State Board of Equalization and Assessment that they were not; that so far as they represented the investment of deposits they should not be assessed to the bank, since

deposits were by law assessed to the depositors; that so far as they represented investment of capital they should not be assessed, since their value was already reflected in the value of the capital stock, the taxation of which was provided for by a section not repealed or modified by the act of 1911. The Board held the view, but did not argue it, that under the proviso that the act "shall not apply to corporations, the property of which is now exempt from taxation," the mortgages of banks could not be brought within the law.

Some of the banks did not accept this ruling. The law for the taxation of banks, like that of other states, provides for a tax, in form at least, on the shareholders and not on the corporation. The Supreme Court of Nebraska has so construed the law. But to arrive at the value of the shares the assessor is authorized to deduct from the value of the capital stock the value of its "real estate and other tangible property assessed separately." Under this clause the First Trust Company of Lincoln deducted the mortgages owned by it on the ground that they were by the law of 1911 declared an interest in real estate and assessed separately. The district court upheld this view of the law; and the Supreme Court, shortly after the adjournment of the Legislature, confirmed the decision of the lower court.

It was held by the higher court[1] that the statute expressly makes the mortgage an interest in the land, and that without the "tax-clause" it must be assessed to the bank, independently of its capital stock and the deduction was clearly authorized. Counsel for the county urged that in case the tax was assumed by the mortgagor the statute specifically provided that the assessor "shall not enter said mortgage for separate assessment or taxation," and that the value of such mortgages should in no case be deducted. The court held, however, that when the mortgagor made such an agreement it must have been in consideration of getting his loan at a lower rate than he otherwise could have secured. If

[1] First Trust Company of Lincoln v. Lancaster County, 141 N. W. Rep., 1037–1038. A second opinion over-ruling a motion for a re-hearing is reported in vol. 142, 542–543.

the bank were thus compelled to take a lower rate and not allowed to deduct the mortgage, the " double taxation " the law was designed to avoid would follow, and the rule of equality in taxation laid down in the constitution would be violated as between individual holders and banks.

In making this ruling, designed to prevent inequality between individuals and banks, it seems, however, that the court has created another kind of inequality of a more serious nature, and one that may lead to interesting developments, — an inequality between different classes of banks. The fiscal results of permitting the deduction are not known and cannot for some time be known. The capital and surplus of the State banks, however, stands at about $20,000,000, and it is assumed that mortgages of the banks to that amount will in time be offset against practically the whole of this sum. This would produce a loss of revenue of about a quarter of a million a year to the treasuries of the State and local governments. But the national banks, because of the narrowly prescribed limitations upon their ownership of real estate mortgages can make no such deductions. They will have to pay taxes to practically the full value of their capital stock, as heretofore. When it is remembered how jealously the Federal courts have guarded the national banks against discriminatory taxation, under section 41 of the National Bank Act of 1864, it is hardly to be doubted, should the question be presented to them, that they would hold the advantage to state banks, secured by the recent decision of the Supreme Court of Nebraska, a violation of the principle of equality guaranteed to the national banks.

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